IN THE

Supreme Court of the United States

OCTOBER TERM 1957

Nos. 18 and 36

CITY OF DETROIT,
a Michigan Municipal Corporation,
and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Appellants and Petitioners,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
Appellee and Respondent
and
THE UNITED STATES OF AMERICA,
Intervenor

ON APPEAL FROM, AND WRIT OF CERTIORARI TO, THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPELLANTS' REPLY BRIEF

(For List of Attorneys see inside front cover)

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ARGUMENT

I.

ERRORS NOTED IN PRESENTATION AND CONSTRUCTION OF AGREED FACTS BY GOVERNMENT AND APPELLEE

A primary problem in most litigation generally stems from sharply disputed questions of fact. This has been eliminated here. The Transcript of Record is composed of (1) the pleadings; (2) certain stipulations entered into to present what witnesses would have testified to, had there been a trial (in view of appellee's motion for summary judgment); (3) material excerpts from contract documents between the Government and its prime contractors as well as between the latter and appellee; and (4) proceedings and opinions of the Courts below.

Appellants are concerned that appellee and even the Government, in their briefs, have not adhered strictly to this record. Six instances are noted and discussed below in the interest of clarification. (Sub-sections A-F, *infra.*)

A.

The suggested inference by the United States (Br. p. 4), even if unintentional, that it was contemplated that partial payments were to be made *by the Government* to appellee as a subcontractor in like manner as provided to be made by the Government to Kaiser is not borne out by the record.[1]

The same error occurs at p. 66 of Brief for Appellee.

Remittances of payments from the respective prime contractors, Ex. 10 and Ex. 11 (R. 258-261) clearly indicate

[1] Murray-Kaiser letter sub-contract, Ex. 2-A, Paragraphs 4, 6 (R. 170-1).

payments to appellee from Kaiser and Wright and not from the Government.

Contrary to appellee's contention, these were not paid on account of the purchase price since prices had not yet been determined. Nor were they for items ordered, work done, in process or ready for inspection and delivery—but only on account of costs.[2] For classification of progress payments see p. 227 of article on Government Supply Contracts by John W. Whelan, *Fordham Law Review*, Summer, 1957 (Vol. XXVI No. 2, p. 224).[3]

Here partial payments were never regarded as an obligation of the Government to appellee. There was never anything more than an undertaking by the Government to authorize partial payments after determination of evidence of costs submitted of the property on which payment is made. Ex. 2B, 11(a) (R. 175). This is supported by the fact that wherever there appears approval of the subcontracts by the Government, one also finds disclaimer of obligation to the vendor (appellee) (R. 172, 221).

B.

Any inference, even if unintentional, at p. 65 of Brief of Appellee that these sub-contracts provided "'that the builder (Murray) shall sell and the purchaser shall buy * * * before its completion and at different stages of its progress * * *'" is a complete departure from the record in this case.[4]

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[2] Stip. No. 4(3) R. 94.

[3] It becomes clear at the outset of this article that the new regulations there discussed deal with progress payments much as earlier regulations dealt with partial payments. (See Note 25 at p. 230, Ibid.)

[4] Distinction noted between progress payments on percentage of completion, or stage of completion and based on costs incurred (p. 236 Ibid).

The manner in which this phrase appears in quotation marks might lead the Court to believe that appellee's counsel is quoting from its sub-contracts. There is no such clause or phrase in these contracts.

Appellee is trying to borrow support from *United States v. Ansonia Brass & Copper Co.*, 218 U. S. 452 to which it is plainly not entitled.

Appellee undertook to manufacture certain airplane parts and sub-assemblies for Kaiser and engine parts and sub-assemblies for Wright and not for the Government.[5]

Appellee was not paid in installments nor at stages of completion of any of such parts, engine parts or sub-assemblies as in Ansonia. It was permitted only to obtain reimbursement for its costs to the extent provided in respective letter subcontracts (Stip. No. 2(7) R. 88).

To further distinguish the facts here from Ansonia, the term "parts" found in the subcontracts plainly refers to components of engines or aircraft. Each of such specific parts to be manufactured and delivered by appellee was expected to be an acceptable completed unit in accordance with specifications and was clearly not being purchased before its completion and at different stages of its progress as the contract provided for the Benyuard in Ansonia.

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[5] Subject of the present sub-contracts was admittedly certain parts and sub-assemblies (Kaiser, see Appellee's Brief 9-10) and engine parts and sub-assemblies (Wright, see 15-16, ibid), as specified therein, to be manufactured by appellee and sold to said prime contractors. (See Brief, United States, 4.)

The partial payment provisions (Par. 11) there referred to had been deleted from the Kaiser prime contract by amendment No. 2 (R. 156-157) dated 25 Jan. 1951. Reinstatement followed on 29 March 1951 pursuant to terms of the letter subcontract entered into between Kaiser and appellee on 23 March 1951 (R. 170).

C.

Again, the United States (Br. p. 34) makes an effort to refute appellants' claim of rights of ownership which appellee was entitled to exercise over the goods. The argument is made that payment of an agreed price is customarily made to the owner of the property by the one acquiring it for such agreed price (Br. p. 35).[6] The inference suggested is that the United States is the owner because it is the recipient of the agreed price.[7]

In support of its argument (pp. 34-35) an excerpt is quoted from sub-paragraph (a) as follows:

> "The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, * * *."

Lifted out of context as it is, it is obvious to the unprejudiced eye that this does not resemble close-handed control of one claiming beneficial ownership of property. The Government is not in the habit of permitting its sole property to be so lightly disposed of by others reserving only terms of disposition.

However, when the excerpt is read in relation to another clause of sub-paragraph (d) quoted only in part at p. 35 of Brief for the United States but which reads in full as follows:

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[6] (*Contra*, see pp. 253-254, *Fordham Law Review*, *supra*.)

[7] To avoid the possibility of the term "agreed price" misleading the Court, it must be recalled that the letter subcontracts contained no agreed price for specific end items. Moreover, appellee was not selling anything whatever to the United States in these particular sub-contracts, only to its prime contractors.

> "The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition) shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be re-reduced accordingly."

it unmasks interest of the Government in the price up to the point of protecting its investment. Beyond that, the price (or proceeds) may go wherever they belong apparently without regard to appellee's claim of title being in the Government to the property acquired or disposed of.

Appellants submit the meaning is clear when the language is fully presented to the Court. The intent of the Government's own language is to protect its investment rather than the property.[8]

D.

An even more untenable construction of the same portion of sub-paragraph(d) is urged by appellee (Br. pp. 75-76). It is claimed:

> "The above clause recognizes the ownership of the Government and permits the contractor to acquire or dispose of the property only 'at the option of the Government' and then only 'upon terms approved by the Contracting Officer.' * * *"

This clause lifted out of said sub-paragraph plainly reads (Par. 11d, R. 176):

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[8] For intent of drafters of clause, see Brief of United States, pp. 39-40.

> "The contractor, either before or after receipt of notice of termination at the *option of the Government*, may acquire or dispose of property title to which is vested in the Government under the Article, upon terms approved by the Contracting Officer." (Emphasis supplied.)

Reading the highlighted phrase as if the comma precedes, instead of follows it is clearly erroneous. As printed, the option of the Government pertains to notice of termination and not to right of acquiring or disposing of the property in question beyond mere approval of terms.

Moreover approval of terms by the contracting officer was plainly[9] a bookkeeping function to maintain security for government financing. Stip. No. 2, 4a-d (R. 87). *American Motors and U. S. v. City of Kenosha*, 274 Wisc. 313, 324.

E.

At bottom of p. 42 statement is made in Brief for United States that gives the impression that the Government is the one that "chooses to make payments and take ownership of the property in advance of its delivery as a finished product."[10]

The Government exercised a choice only in the inclusion of the partial-payment title-passage clause in the Procurement Regulations and, of course, in selection of terminology of the clause by Government draftsmen.[10] However, from that point on, the negotiating contractor chooses (1) whether to request it in its contract, (2) how much (up to the maximum allowed) he should request in negotiating the

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[9] Argument made is *contra* to provisions of letter sub-contracts referred to under our subdivisions A and B, *supra*.

[10] Brief for United States, pp. 39-40.

contract, (3) amount of costs incurred he should in fact request reimbursement for during production, and (4) the time when such request should be made.

In effect the clause gives no protection to the Government if it is left to the private contractor's initiative in this regard. (See pp. 116-117 of Appellants' Brief.)

F.

An effort to make title and ownership appear synonymous—as if interchangeable is made by the Government (Br. pp. 14, 16, 31, 32 and 33) where discussion appears on Appellants' contention that the title of the Government to the materials was only a security or paper title.

The Government has not refuted or answered by any authority the reasoning of the Wisconsin Supreme Court in American Motors at p. 322 of 274 Wisc. that title and ownership are distinguishable. The conclusion of that Court was:

> "Conceding that title was transferred, there was, however, no true transfer of ownership."

Analysis of entire contract including rights reserved to Appellee (Appellants' Br. p. 58, *et seq.*) and conduct of the parties thereunder (Br. p. 69, *et seq.*) brings the present case squarely within the determination of the Wisconsin Supreme Court, *supra.*

II.

APPELLANTS MAY QUESTION AUTHORITY FOR AND VALIDITY OF PROVISIONS OF DEFENSE CONTRACTS OR SUB-CONTRACTS WITHOUT BEING PARTIES THERETO.

(In reply to Appellee's Counter-Question I)

Appellee (Murray) introduces as its first question a matter volunteered by the opinion of the District Judge and left unnoticed by the Court of Appeals. Question is now raised as to Appellants' right to collaterally attack provisions of the defense contracts to which neither Appellant is a party.

It is Appellants' position that there is no merit in the District Judge's suggestion nor in Appellee's question. None of the cases cited as authority by Appellee deal with tax questions or involve the United States on the one hand and a state or local unit of a state on the other. All deal with contractors attempting to get out from under an undertaking with the Government or unsuccessful bidders who claim rights where others obtained Government contracts.

Appellee's entire case is predicated upon the substance of certain contracts between itself and prime contractors and of other contracts between the latter and the Government. It is contended that particular provisions in such contracts nullify local taxes.

The claim that Appellants may not challenge the validity of provisions of those contracts, when the very essence of Murray's lawsuit is based on such provisions, would remove rights to which any defendants are entitled.

Were the situation reversed, such a position would be strenuously opposed by the Government. For example,

f the City of Detroit were to enter into a contract with Murray and provide therein that no social security taxes be included as part of the cost of the article to be manufactured, could it be said that the Government was barred from resisting the effect of such a provision upon it in litigation to which it became a party? The answer is obviously "No." No parties, whether state or private, should be permitted to overcome a federal tax by virtue of contract provisions to which the Government was not a party.

The very opposite of Appellee's contention here was upheld when the United States Government was permitted to challenge a written agreement for the reason that it was not at party to the contract. *Scofield v. Greer,* 185 F. 2d 551.

In *Landa v. Commr. of Internal Revenue,* 206 F. 2d 431, it was stated (p. 432):

> "Generally in the field of taxation, administrators of the laws and the courts, are concerned with substance and realities, and formal written documents are not rigidly binding. The taxpayer as well as the Commissioner of Internal Revenue is entitled to the benefit of this rule. Moreover, the oral testimony here was not barred by the parol evidence rule, since the Commissioner was not a party or privy of a party to the written agreements."

Our only response to the oracular pronouncement (Appellee's Br. 33) quoted from *In re American Boiler Works,* 220 F. 2nd 319, at 321 is that the writer of that opinion would undoubtedly consider the matter differently had the issues and briefs in this case been before him there.[11]

It is significant that the first counter-question raised by appellee is not joined in by the United States in its brief.

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[11] *Fordham Law Review, supra,* p. 260.

III.

MATERIALS ARE NOT AN EQUIVALENT FOR SPECIFIC ITEMS BEING PURCHASED BY SUB-CONTRACTS TO OVERCOME PROHIBITION OF R. S. §3648

(In reply to Government's Question I and Appellee's Question II)

Appellee and the Government rely principally on three decisions of this Court.

1. *United States v. Allegheny*, 322 U. S. 174, has been distinguished by Appellants (Br. 47-52; 120-125) refuting application to the facts here of the inflexible rule claimed from it.

2. *Kern-Limerick, Inc., and United States v. Scurlock*, 374 U. S. 110, has been discussed with our documented argument (Br. 37-44 Ibid.) that if this Court had had before it Reports of Committee Hearings prior to adoption of Armed Services Procurement Act of 1947 the majority opinion might have been otherwise (Br. 41, 44).

3. *United States v. Ansonia Brass & Copper Co.*, 218 U. S. 452, referred to at p. 4, *supra*, is claimed as absolute authority by appellee and the Government. They assume that this Court will conclude the facts at hand are governed by the determination in *Ansonia*.[12]

Our position is that Ansonia is authority solely for the proposition that the title taken therein to parts of a vessel at specified stage of construction (which are the subject of the contract) and paid for was superior to any lien claim under state law. In the cited case a portion of the contract dealt with purchase of a naval dredge in completed parts at specified stages of construction. When installment payments were made at such stages the ownership clause provided that parts of the vessel thus paid

[12] Further analysis of the facts in *Ansonia* will be found in connection with the fourth section of this Reply, *infra* p. 17.

for became thereby the sole property of the United States and that insurance be effected by the contractor on behalf of the Government to at least the amount of each partial payment (P. 466 of 218 U. S.). The Government actually agreed to purchase the vessel in parts.

This is far from being authority for making of partial payments and taking title to materials which are not the subject matter of the contract, but are only the ingredients purchased by an independent subcontractor to enable it to manufacture specific end items which had yet to be inspected, delivered and paid for at prices to be negotiated between the parties to the contract.

As already pointed out, appellee's sub-contracts were not for purchase and sale of materials but admittedly only for specific acceptable end items (Appellee's Br. 10, 16; Brief for United States, 4, 8) (Appellants' Br. 113-115)[13]

Based on the erroneous premise that the facts here and in Ansonia are identical, Appellee and the Government challenge Appellants' contention (Br. 29) that Rev. Stat. 3648 defines and limits the powers of government officers herein except as Congress otherwise directs.[14]

Since Appellee's position (Br. 43) is included in the broader presentation by the Government (Br. 15-22) we address ourselves to the latter.

To illustrate how the Government strays from the plain language and intent of §3648 we have only to begin with its own analysis of provisions of that statute (Br. 19).

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[13] *Fordham Law Review, supra,* p. 256, Note 126.

[14] This prohibition affects action by administrative officers unless Congress gives them further permission. *United States v. Arizona,* 295 U. S. 174, accordingly controls unless the First War Powers Act of 1941, Title II is claimed as permissive authority by the Government. See *infra,* pp. 15-16.

> "Section 3648, as amended, prohibits the making of advance payments of any kind. It also prohibits payments being made on a contract under circumstances where the Government does not at the time receive an equivalent."[15]

A distinction may be noted in this analysis between "advance payments" and generic term "payment". Appellants have not claimed amounts received by appellee were specifically advance payments. Our position is that the procedure followed here violated §3648 regardless of any name given the payment by procurement officers.

However, assuming receipt of an equivalent is sufficient, does the transfer of title to materials as such satisfy the statute which bars payment in excess of the value of the service rendered or of the aritcles delivered previously to such payment? We submit no decisions of this Court support such a proposition.

The Government claims there is no violation of §3648 because it only has to obtain an equivalent for "articles delivered". This it urges has been accomplished by taking title to the materials in appellee's possession, as "property acquired" by the Government.

We cannot agree however that acquisition of title to materials which are not the subject matter of the contract

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[15] Cited in support are two Attorney General Opinions. 18 Op. A. G. 105 deals with a ship wholly finished but for a fractured shaft which prevented trial trip and formal acceptance. The opinion approved payment of all of the tenth payment (i. e., installment), except for a named sum to be reserved, on the premise that the money had been actually earned and the Government had a lien upon the ship for all payments made with sureties to guarantee full completion and good workmanship. 18 Op. A. G. 101 is less applicable, dealing with modification of the time for paying the ten per centum reserved upon installments on contracts for construction of several vessels. In neither is the character of the Government's interest determined beyond obtaining security.

satisfies the plain meaning of "articles delivered" which perforce are the subject of the contract. As illustration of how the Government arrives at its erroneous conclusion, we note the following shifting from one phrase to another in the course of its presentation (Br. 15-22):

At p. 15 in headnote: *property produced or acquired under the contract.* In the text which follows on the same page: *contract property.* On p. 16 *property involved.* On p. 17: *authorized materials.*[16] Below on same page: *property in question.* On p. 19: *material and work in question.*

In the concluding paragraph of the first section, the Government (Br. 19) states that appellants urge "that Sec. 3648 Revised Statutes, as amended, expressly, and the Armed Services Procurement Act of 1947, by implication, prohibit the making of partial payments where the United States takes title to the *work.*"

Appellants have no choice but to deny that they so intended due to use of the term "*work*" which is one of the many synonymous employed by the Government to lead the Court to believe that "*property acquired*" is no different than "*articles delivered.*"[17]

At p. 20, the paraphrasing continues with *work in progress*[18] and concludes on p. 22 with a statement that "it is untenable to conclude now that Congress intended by

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[16] Kern-Limerick is cited above as if authority to procure authorized materials. There, subject of the contract was two tractors *in esse* and not materials bought to be incorporated by the Government into an end product.

[17] See appendix to Report No. 1507 II, House Misc. Reports VII, U. S. 10558 (Cited in Appellants' Brief, p. 35).

[18] Other cited Opinions of Attorney-General and Comptroller-General as well as Ansonia are answered in Section IV, *infra*, p. 20.

§3648, as amended, to prohibit the making of partial payments where the value of the services performed and the *property acquired* exceed the amount of the payments.

Absence of logical relevance is apparent when the phrase "property acquired" which is not the subject of the contract is compared with "articles delivered." It also demonstrates how far administrative officers have extended procurement procedures in avoidance of the prohibition in §3648 against advancement *to the contractor of funds with which to enable him to perform his contract.* This italicized language is not ours but is lifted out of 1 Comp. Gen. 143, 145-146 (1921).

Being thus prohibited, the method of financing attempted here should be stricken down as unauthorized. There is accordingly no assumed authority nor any specific authority in the Armed Services Procurement Act of 1947 except as Sec. 5 overcomes such prohibition.

The only possible authority stems from the First War Powers Act of 1941 (C 593, 55 Stat. 838) as amended.

This we discussed in detail (Br. 34-36) and the Government responded in footnote at p. 16 of its Brief.

Appellee's sub-contracts and those of its prime contractors consistently cited as authority (R. 143, 191) Armed Services Procurement Act of 1947, Sec. 2 (*c*) (10). At no time was any claim made of authority from Executive Order 10210 (Feb. 2, 1951, 16 F. R. 1049) issued pursuant to the reactivated War Powers Act, *supra.*[19]

No compulsion existed thereunder to use the disputed title passage clause in view of broad although temporary authority to enter into contracts without competitive bid-

[19] Purpose of extension appears in House Report No. 558, Vol. 2, U. S. Code Congressional and Administrative News, pp. 1770-73.

ding in those cases where bidding was still required; to enter into contracts without performance bonds; to amend or modify contracts; and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment or modification of the contract whenever it was deemed such action would facilitate the prosecution of the war. In practice, this authority is relied on in only a few categories and not as a usual basis for making partial or progress payments.[20]

In view of the Government's suggestion that this Court need not reach that question (Br. footnote, p. 16), we wonder if its sole possible ground for authority under said War Powers Act is not here being pressed.

IV.

ANSONIA IS NOT AUTHORITY THAT ABSOLUTE TITLE CAN BE CLAIMED TO MATERIALS TO BE INCORPORATED INTO END ITEMS

(In reply to Government's Question II and Appellee's Question III)

In responding to Appellants' contention that the title here was a "paper title" the Government claims (Br. 31) that the language used in the subcontracts to transfer ownership is language which the courts have consistently approved or have themselves used to express such a meaning.

Appellee cites the same authorities as having held that *these* partial payment-title vesting clauses effectively vested title and beneficial ownership to the material and work

[20] *Fordham Law Review, supra*, p. 234.

in process in the Government—as distinguished from mere security or lien title (Br. 64).

We submit that the manner in which the vesting language is here used and the specific issues raised make this case a novel one.

Neither Appellee nor the Government stop to analyze the facts here and compare them against the authorities cited. We contend that their citations cannot be accepted as absolutes. When examined, they do not support the conclusion that absolute title was intended to be taken to secondary items, i.e., materials acquired by an independent subcontractor to be incorporated into the specific items with which the subcontracts are principally concerned.

The Ansonia case, *supra*,[21] is claimed by Appellee to be the primary and controlling authority for virtually all of the other cases there cited. Appellee fails, however, to take cognizance of an important difference in facts in that case, which clearly distinguishes it from the present case.

In *Ansonia* the contract of the Government, in part, expressly dealt with the purchase of a naval dredge in *completed parts of the vessel*, with provision for *inspection* of and *payment* for such completed parts of the vessel, in stated equal installments as the work progressed (218 U. S. 465-466). The contract further provided that the *parts of the vessel thus paid for* by partial or progress payments would become thereby the sole property of the United States. It did not, as do Appellee's subcontracts, undertake to pay partial payments based on costs with title passing to materials or parts to be, or intended to be, incorporated into a specific end product.

[21] See pp. 11-12, *supra*.

The contractor there agreed to sell and the Government agreed to buy each completed part of the vessel and to pay full price therefor.

Here, the subject matter of both the prime contracts and the subcontracts were the specific end items of which the Government expected to take delivery—engines and parts, and sub-assemblies to be incorporated in completed acceptable aircraft units. The Government neither purchased nor ever intended to have beneficial use of materials or to take delivery of them, except as they were formed and processed into the specified end items. Hence *materials*, to which the Government was interested in taking title, *are not the subject matter of the contract.*[22]

Similar distinctions were noted by this Court in *Ansonia* between contract provisions in that case and those in *Clarkson v. Stevens*, 106 U. S. 505 (27 L. Ed. 139, 1 Sup. Ct. Rep. 200), in which it rejected a claim that title to a vessel passed to the Government. It makes this analysis (p. 469):

> "It is suggested, in this connection, that the contract with the government in the case of the Benyuard is not different in effect than the one passed upon in *Clarkson v. Stevens*, 106 U. S. 505, 27 L. Ed. 139, 1 Sup. Ct. Rep. 200. In that case the contract provided that the materials received at the yard for the construction of the steamer

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[22] "The fact should never be lost sight of that the 'Progress Payments' clause of which we are speaking is used principally in fixed-price supply contracts. Under such contracts, the Government is buyer and the contractor is seller of end item, whether a tank or gun or an airplane or some item of electronic equipment. The Government is not contracting for the purchase of title-vested property, as such, but only for the acquisition of such part of that property as is incorporated in the end items." *Fordham Law Review*, *supra*, 256, footnote 126. See also note 3 on p. 3, *supra*, with reference to treatment of progress payments under new regulations as partial payments were treated under the old regulations, applicable here.

> should be distinctly marked with the letters 'U. S.,' and should become the property of and belong to the United States. There was no provision that title to the vessel should vest in the United States as fast as parts thereof were constructed, and Mr. Justice Mathews, who delivered the opinion of the court, approved the opinion of the court of errors and appeals of New Jersey, expressing the view that the declaration as to the materials excluded the implication sought to be raised as to the title in the unfinished ship; 'for,' said Mr. Justice Mathews, 'the inference is obvious, from the particularity of such a provision, that the larger interest would not be left to mere intendment.' (p. 516)."

Only failure to recognize such distinction—between materials and the end-items being purchased—or failure of counsel to point it out can account for the apparent acceptance of Ansonia's conclusion by lower courts in decisions cited by Appellee as controlled by *Ansonia*. The cases cited are also distinguishable from the present case on facts.[23]

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[23] In *Re Read-York*, 152 F. (2d) 313; *Douglas Aircraft Co., Inc., v. Byram*, 57 Cal. App. (2d) 311, 134 Pac. (2d) 15; and *Wright Aeronautical Corp. v. Glander*, 151 Ohio 29, 84 N. E. (2d) 483, title clauses were the same in each case and provided that title to all property on which partial payments are made prior to the contract's completion shall vest in the Government *in its then condition*. In *Craig v. Infalls*, 192 Miss. 254, 5 So. (2d) 676; *Superior Shipbuilding Co. v. Beckley*, 175 Wis. 337, 185 N. W. 199; and *In re American Boiler Works*, 220 F. (2d) 319, title vesting provisions in each case refer to materials, and, respectively, to "the vessel itself," to "said vessel, either completed or under construction, *insofar as it shall have been inspected and approved and paid for* * * *," and to "vessels under construction." On materially different facts from Ansonia and here, the Court found in the *Superior Shipbuilding* case, cited in this footnote, that the contractor was little more than an agent employed by the Government to perform certain work for it.

Appellee also cites as supporting its view the cases of *Kern-Limerick, Inc., v. Scurlock*, 347 U. S. 110, and *United States v. Allegheny County*, 322 U. S. 174. No partial payment-title vesting clause was involved in the first case. No issue comparable to the one at hand was presented in the second one since the disputed articles in that case had been completed, accepted and fully paid for and the Government had taken title thereto.

All opinions of Attorneys General and Government accounting officers, following *Ansonia,* blandly assume a broad principle on facts peculiar to *Ansonia.* These, but for one possible exception,[24] deal with specific end items, subjects of contracts there considered, to which title was to be taken in completed state or in a particular state of incompletion, upon making of partial payments. In the noted exception, that opinion holds only that Sec. 3648 would not prohibit a provision for taking of title to work in progress and material *in its then* condition upon making partial payments in proportionate amounts as it came into the contractor's plant and was paid for. The true character of title taken is not there considered.

The vital difference between our position and that of our opponents is that, in their opinion, it matters not what the subject matter of the contract is. They assume that title to materials or inventory on hand or later acquired, to be or intended to be processed into specific form acceptable to the Government, may be an equivalent, even though title thereto will (re)vest[25] if not delivered to and accepted, or incorporated into supplies delivered to and accepted by the Government. They rely on assumed opinions which never squarely considered the factual distinction to which we point.

Where analogy is made to a contract passing title to materials, the *Ansonia* opinion says, in effect, no—that is different; that is exactly what was attempted but failed in its purport in *Clarkson v. Stevens.* However, title passage to a ship at its several stages of construction, when inspected and paid for in proportion to the percentage of completion, is permitted because it deals with the subject of the contract.

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[24] 1 Comp. Gen. 143-146.

[25] See provision in the subcontracts at the very end of sub-paragraph (d) (R. 176, 205).

Tentative Nature of Title Indicates Security for Government's Investment

It is obvious that Appellee over-extended *Ansonia* as authority for the proposition that partial payment-title vesting clauses "such as here involved" are effective to vest *title and beneficial ownership* (Br. 64-65). That case only went so far as to uphold a claim of title by the Government as against creditors claiming under state lien laws. It cannot be interpreted as excluding title for security only, as the true character of the title taken.

We contend that materials, which are of a secondary nature, and which have not yet been processed, inspected and accepted, are no more than security upon the making of a partial payment and remain the property of the Appellee. If title to such materials vested in the Government, it was, under the construction of the contract which we claim it should receive, only a security or paper title, with appellee retaining beneficial ownership.

A salient guiding principle for construction of contracts for supplying labor and materials and making a chattel is enunciated by this Court in *Clarkson v. Stevens* (p. 515, 106 U. S.):

> "The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent, *open in every case*, to be determined upon terms of the contract, and the circumstances attending the transaction. I. Pars. Ship. and Adm., 63. And such seems to us to be the true principle." (Emphasis supplied.)

Ansonia restates this rule in almost identical language (at p. 467, 218 U. S.).

Mere inclusion of such clauses in contracts or their language is not controlling. Under the rule of construction just quoted, not only the title vesting clause but "all sections of the contract must be read in the light of the purposes of the contracting parties" *(Amsonia, supra)*.

When the subcontracts are so considered, we submit, the partial payment-title vesting clauses therein were effective only to transfer a security or paper title and beneficial ownership of the property at all times reposed in Appellee. Conclusive evidence to support such a construction is found throughout the contract provisions. (Our Br. 58-76.)

We stress throughout our brief contention that purpose of partial payment-title vesting clauses in contracts was to secure and protect the Government's investment which it advanced in the form of partial payments. This claim is fortified by statements in the Government's brief (Br. 39-40).[26] Appellee, on the other hand, gives emphasis to the need for complete and absolute control by the Government of essential war materials "at all times" as requiring inclusion of the clause in contracts. This claim is stripped of validity when we are reminded that not all contracts contained this clause, in which case control of materials purchased by the contractor for contract performance, was "at all times" in the contractor. Inclusion of the clause, even under our opponents' views of their effect, did not determine control of the materials until Appellee *requested* and *received* a partial payment. The same would be true after partial payments were liquidated. It was the investment of Government funds which changed the situation. It must be borne in mind that the

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[26] See also p. 6, *supra*.

contractor, not the Government, controls the decision and initiates the action for partial payment. Under our view, in either case, equitable ownership "at all times" was in Appellee, while the Government took a mere security or paper title to protect its finances when the partial payments were made. *American Motors Corp. v. City of Kenosha*, 274 Wis. 315, 80 N. W. (2d) 363 (Br. 58-76).

It is interesting to note that Murray, for example, entered into the subcontract with Wright on April 19, 1951, requested a partial payment on October 30, 1951, and Wright made the payment on December 31, 1951, on the eve of assessment day and nine months after the date of the contract. In the long interim control of the materials was definitely not in the Government and the record in this case reveals no anxiety on its part in this respect.

To illustrate the practical application of the provision for liquidation of partial payments, we offered an example in our brief (p. 65) which Appellee challenges (Br. 68) as assuming a situation which does not and will not obtain in the normal course of events:

During the period from the execution of its letter subcontracts until assessment day, January 1, 1952, Appellee received from the prime contractors a total of $674,776 in partial payments (R. 258, 259-261). The agreed dollar valuation of personal property for which Appellee was assessed amounted to $2,043,670 [Stip. No. 1 (8), R. 84]. The fact that the materials on hand and work in process had then mounted to several times the value of sums received in partial payments as of assessment date is complete answer to the following statement in the Government's brief (p. 39):

> "The present case, we submit, is an actual and typical example of how the partial payment provision works.

Nothing in the record, then, supports the Government's claim that "there is every incentive for the contractor to hold his investment at the minimum by seeking partial payments to the full amount authorized" (Br. 39), or that "the contractor's investment in the property is relatively small" (Br. 42).

If we may be permitted to indulge in speculation as has the Government (at p. 39), it would be much more logical to assume that in the period from the earliest requests for partial payment on either subcontract, certain work in progress would be near delivery stage. Let us suppose acceptance and delivery were withheld until after assessment date and value of goods delivered was equal to the total of partial payments. The items delivered would result in liquidation of the outstanding partial payments. Title to all materials would vest again in Appellee by the terms of subdivision (d) of the partial-payment provisions. Such an example of title passing back and forth, dependent on existence of partial payments outstanding, emphasize the true security character of the title-passing provision.

The *American Motors* case, *supra,* stands as the only case, in all respects identical with the case at bar, which not only considered but interpreted the exact contractual provisions now before this Court (Appellants' Brief, 60, 62, 65, 68).

The *American Motors* case is supported by *United States v. Lennox Metal Manufacturing Co.*, 225 F. (2d) 302. Appellee replies that the *Lennox* case "does not turn upon the issue of whether a partial payment-title vesting clause creates absolute title or merely a security or lien title" (Br. 64). Such an analysis, however, ignores

the plain and unambiguous opinion of the Court in that case, expressed as follows, at p. 317, *supra:*

> "The only other relief sought is, essentially, the enforcement of an equitable lien on defendants' property."

We do not contend that any language in the subcontracts is "inept" (Government Brief, 31). We disagree, however, that any single clause in and of itself is here controlling; further, the facts to which the language applies play a part in determining the nature of the title taken by the Government. Despite the fact that vesting language in *Aysonia* was almost identical with that in *Clarkson v. Stevens,* materially different facts, nevertheless, produced diametrically opposed results in these two cases.

Under the rule of construction applicable in this case, we contend that Murray was at all times the beneficial owner of the property in dispute here, while the Government held only a security or paper title thereto, to protect its financing of Appellee's subcontracts. Such beneficial ownership, we submit, leaves no basis for Appellee's claim for refund of the taxes here assessed.

V.

THESE NON-DISCRIMINATORY TAXES ARE VALID AS IMPOSING NO DIRECT BURDEN ON THE FEDERAL GOVERNMENT IN VIOLATION OF ITS IMPLIED CONSTITUTIONAL IMMUNITY.

(In reply to Government Question III and Appellee's Question IV)

The doctrine of implied Constitutional immunity of the Federal Government was established by this Court to preserve and protect the Union from hostile action by the States, either by taxation or regulation.

M'Culloch v. Maryland, 4 Wheat. 579.

It has been used, at times, however, merely to preserve and protect private persons from paying their share of the local tax burdens.

United States v. Allegheny County, 322 U. S. 174.

And at other times to permit Government officials to create immunity for private persons solely for the purpose of avoiding local taxes.

Kern-Limerick Inc. and United States v. Scurlock, 347 U. S. 110.

And once it was applied to protect a private person from paying a special assessment merely because the improvements for which the assessment was laid were installed earlier, when the Government owned the property.

Lee v. Osceola Imp. Dist., 268 U. S. 643.

And a private person and his property were once protected from enforcement of a tax lien, because the tax

assessment was made while the Government had title obtained through foreclosure for Federal taxes.

Van Brocklin v. Tennessee, 117 U. S. 151.

In many cases now overruled private persons have been protected from local taxation merely because of an indirect economic effect on the Government.

Graves v. Texas Co., 298 U. S. 393;
Panhandle Oil Co. v. Mississippi, 277 U. S. 218;
Rogers v. Graves, 299 U. S. 401.

If the preservation and protection of the Government from hostile State action is the true concern of this Court under this doctrine and not the preservation and protection of private individuals or corporations, then it is incumbent on the Court to determine in each case if the particular tax involved (whether property, privilege, specific, excise or whatever) is actually or potentially destructive to any governmental powers or functions.

The Court in applying this test is not, then, concerned with the name or form or type of tax but is concerned with its substance and effect on the Government (Our Br. 111).

If the tax, then, is not levied upon a "means employed by the government for the execution of its powers" and does not "retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government" (*M'Culloch v. Maryland*, 4 Wheat. 579, 607, 609), the Government's supremacy is still preserved and protected (Our Br. 77-93; 113-116).

And if the tax is imposed upon and can be collected from a private person with the interests of the Govern-

ment protected, the Government's supremacy is likewise preserved (Our Br. 94-110).

New Brunswick v. United States, 276 U. S. 547;
James v. Dravo Contracting Co., 302 U. S. 134;
S. R. A. Inc. v. Minnesota, 327 U. S. 558;
Union Pac. R. R. Peniston, 85 U. S. 787.

The only local laws, tax or otherwise, which can really interfere with Government operations in the sense that they are a threat to the Government's supremacy, are discriminatory tax laws or regulations and those which could result in the stoppage of a federal activity if a tax or fee is not paid or a local regulation not complied with.

M'Culloch v. Maryland, supra;
Mayo v. United States, 319 U. S. 441.

The Government and Appellee take the position on this question that this is an *ad valorem* property tax upon Government property; that *Van Brocklin v. Tennessee*, *Lee v. Osceola Imp. Dist.*, *Mayo v. United States*, *United States v. Allegheny County*, and *Kern-Limerick v. Scurlock*, *supra*, are applicable and controlling and that, therefore, the tax is invalid under the implied constitutional immunity of the federal Government.

The facts in this case i.e., that the tax is levied upon and charged to a private corporation which is the taxpayer, that the tax cannot be collected from the Government or its property and that the direct burden or incidence is, therefore, upon such private corporation and not upon a means of Government operation, nor, is it an interference with any Government function, are, to the Government and appellee, irrelevant.

Their argument discards all of the decisions of this Court where factual situations showing or failing to show interference with Government operations, were controlling, such as *M'Culloch v. Maryland, supra, Thomson v. Union Pac. R. R.*, 76 U. S. 792, *Union Pac. R. R. v. Peniston, supra, James v. Dravo Contracting Co., supra, Graves v. New York*, 306 U. S. 466, *Oklahoma Tax Com. v. Texas Co.*, 336 U. S. 342, *Alabama v. King & Boozer*, 314 U. S. 1, *Curry v. United States*, 314 U. S. 14, *Esso Standard Oil Co. v. Evans*, 345 U. S. 495, *S. R. A. Inc. v. Minnesota, supra, New Brunswick v. United States, supra, Land O'Lakes v. Wadena County*, 229 Minn. 103, affirmed by this Court 338 U. S. 897, citing 327 U. S. 558, and others.

The facts in the above cases having shown the direct burden or incidence of the taxes involved to be upon private persons, and, there being no interference with Government operations, those taxes were validated (except for *M'Culloch*, the facts in which having demonstrated an interference with Government operations, the tax was held invalid).

All of the above cases were interpreting and applying the doctrine of implied constitutional immunity of the federal Government together with its limitations as pronounced by Chief Justice Marshall in *M'Culloch*, 4 Wheat. 607, 609:

> "* * * the states have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general Government."
>
> "We find then on just theory a total failure of this original right to tax the means employed by the Government of the Union, for the execution of its powers."

And, continuing,

> "* * * this opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax laid upon the real property of the bank within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."
>
> "But this is a tax on the operations of the bank, and is consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

Simply put:

> "* * * The States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government."
>
> *Union Pacific R. R. v. Peniston*, 85 U. S. at p. 791.

Our contention (Br. 113-116), unchallenged by the Government and appellee, is that this is not a tax on the "means of government operations"; nor does it "retard, impede, burden or in any manner control the operations * * * of the government." It is not a tax "the direct effect of which hinders the exercise of any Government powers."

Our brief (Br. 94-105) amply illustrates the personal nature of the tax; that the tax is levied upon and charged to a private corporation under the Charter of Detroit; that the private corporation alone is responsible for payment of the tax and that it alone can be sued for its collection or its property seized for non-payment.

It is not denied that neither the Government nor its property (if this be in truth Government property) can ever be proceeded against for collection of the tax as we have shown (Br. 107).

Substance, Not Form or Name, of Tax Controls

The Government (Br. 44) urges the Court to look to substance rather than nomenclature and form to determine the *nature* and *effect* of this levy (although our opponents' arguments belie it). We first suggested this approach (Br. 111-115).

If substance be "that which underlies outward manifestations" *(Webster)* then the levy of this tax and its charge to Murray, under the Charter and by the assessment roll (Br. 94-106), plus the fact that both under the law and the decisions the tax can be collected by suit against Murray or levy upon its property (Our Br. id.) and that no enforcement can be or was made against the Government or its property (Our Br. 107-110), is the substance of this taxation. The name given to it or its measurement by valuing property are, so far as nature and effect, merely name and form.

However, assuming for argument, that this is a property tax because it is *ad valorem*, i.e., according to the value of property, is there any reason why the opinions of this Court in so-called privilege tax cases, such as *Dravo, etc., supra*, should not be considered in the determination of this matter? We think they should.

The Government itself so suggests when it says:

> "Conceivably one might denominate any ordinary 'property' tax as a 'privilege tax'. A property interest is ordinarily regarded as an aggregation of rights and privileges possesed by the owner.

> So viewed, a so-called tax on property is virtually indistinguishable, as a conceptual matter, from a tax on the privilege of holding the property." (P. 22 Brief of Government in *U. S. A. and Borg-Warner v. City of Detroit*, No. 26, Supreme Court of United States, set for hearing with this case; *U. S. v. City of Detroit*, 345 Mich. 601).[27]

Accepting the Government's concept above, if a tax on the privilege of holding property *(Esso)* is "virtually indistinguishable" from a tax on property *(Allegheny)*, then, if the direct burden and incidence of a property tax is upon a private person and there is no interference with Government operations or functions *(Dravo)*, why shouldn't the latter tax be equally valid. The fact that Government property is being used in both to measure the amount of tax the private person is required to pay changes nothing. Both are non-discriminatory and neither interferes with any Government operations.

Our contention (passing the questions of authority, Q. I, and ownership v. paper title, Q. II), is that the underlying principles of implied immunity as well as its limitations as laid down by *M'Culloch* and interpreted and reasserted in *Thomson, Peniston, Dravo, Graves v. New York, King-Boozer, Esso, S. R. A., supra, etc.*, admit of no distinction between types of taxes, if the taxes impose no direct burden on the Government, are non-discriminatory and constitute no impediment to Government functions.

The mere fact that the situs of property determines the tax jurisdiction (in certain instances) (Appellee's Br. 95) is not destructive of the character of the assessment as personal or *in rem*.

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[27] See reference by Government in its Brief in this case to Borg-Warner Brief (Footnote p. 43).

Many privilege and excise taxes are levied by the community having jurisdiction over the property used as the tax base.

And under the Detroit Charter personal property may be outside the city and still be assessed to and the tax collected from the company owning it doing business in Detroit, the jurisdiction of the person being therefore determinative of the tax jurisdiction in certain instances. *Annis Furs, Inc., v. City of Detroit*, 336 Mich. 527, 531.

In all its manifestations, the levy (or charge) of this tax, the liability for its payment and the enforcement are all solely against Murray, appellee, a private corporation. The Government or its property is as free of harm or interference (either actual or potential) as it was in *Dravo, Esso, Graves v. New York, King-Boozer, S. R. A., New Brunswick* etc. *supra*.

A tax otherwise valid is not vitiated by its measurement in part or whole by the value of Government property, *S. R. A., New Brunswick, supra;* or by the value of immune property. *Plummer v. Coles*, 173 U. S. 115, *Home Insurance Co. v. New York*, 134 U. S. 594, *Educational Films Corp. v. Ward*, 282 U. S. 379, *United States v. City of Detroit*, 345 Mich. 601, 611 (United States Supreme Court No. 26. Appeal to be heard following this case).

A tax may legally be levied against and collected from a person in possession of property measured by that property's value, in Michigan under the General Tax Law and the City Charter (Our Br. 102-3). It would be no more valid if it were designated as a tax on the privilege of using the property.

If nomenclature is not the distinguishing mark in deciding the validity of a tax within the immunity doctrine, then there is no difference in the two, because there is no

difference in substance. The mere fact that Government property in the taxpayer's possession or used by him is the measure of the tax in each instance, still leaves them indistinguishable as tax laws under immunity principles.

Obviously a tax levied on a private person *for the privilege of using* (or storing, as in *Esso*) Government property and one levied against a private person *because he possesses* Government property which he is using (or storing) are different only in name, if the tax he has to pay is the same. They can both by simple calculation produce the same amount of taxes, as the tax in each instance may be measured by the value or quantity of the property possessed, used or stored and can, arithmetically, be made to produce the same result. To say that one is valid under the principles of constitutional immunity (the preservation and protection of the Government's supremacy) and the other is invalid, would "prove a triumph for semanticism."[28]

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[28] "*The Remnant of Intergovernmental Tax Immunities*" by Thomas Reed Powell, *58 Harvard Law Review*, at 784-785.

The author demonstrates how the mere change in form or wording of the Pennsylvania Statute involved in *Allegheny* might accomplish a change in the Court's opinion without changing in any respect the effect (or lack of effect) on the Government.

"Though there was agreement as to what actually happened under the Pennsylvania system, the majority did not agree that the state law really put the tax on the private land. Mr. Justice Jackson quotes from the statute what he calls its basic provision to the effect that 'The following *subjects and property* shall * * * be valued and assessed, *and subject to taxation*.' He reports no statutory reference to machinery, but notes the procedure of the assessors in learning its value from a machinery expert. It is not clear whether the statutory reference to property is relied on as pointing to the conclusion or as propping it up or both. The particular words quoted refer to property and not to persons. Yet if the statute had read that 'there is hereby imposed on each owner of real estate a tax on the value thereof and on the value of all chattels thereon, provided no lien for non-payment shall attach to any chattels not the property of

(Continued on next page)

Analysis and Comparison of Government's and Appellee's Case Authorities with Appellants' Authorities

(a) United States v. Allegheny

The Court in *Allegheny* said that the real property tax law there under consideration was a "form of taxation not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing". We say and support it by the words of our law as well as the decisions of our Court (Br. 98-103) that the form of personal property taxation under our law is regarded primarily as a form of personal taxation rather than a tax against the property as a thing. It should be so regarded by this Court under the implied immunity doctrine.

Even if it be regarded as a tax *in rem* rather than *in personam*, under these circumstances the direct burden, the incidence and the enforcement are all imposed upon

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(Continued from preceding page)

the owner of the real estate,' the practical impact of the Pennsylvania law would have been unchanged. If such alternative phrasing should lead to a difference of decision, it would prove a triumph for semanticism."

It would also prove a triumph for the proponents of the correct interpretation of the doctrine of immunity (not merely local tax bodies) if the Court, at the same time it was approving such a statute (or this tax law) were to say:

"Allegheny is out of harmony with correct principles, and, though it may be distinguished, is overruled."

In *Esso Standard Oil v. Evans, supra*, although the Court distinguished Allegheny, it was a distinction without a difference and actually nullified Allegheny in principle. Can it make any difference to the preservation of the Government's supremacy or interference with its operations if a tax paid by a private person is measured by the "worth" or the "quantity" of Government property as the Court there said in distinguishing Allegheny from Esso.

a private person and are not, even as they may not, be directed against the Government. (*United States v. Alabama*, 313 U. S. 273, *S. R. A. v. Minnesota*, *supra*.)

The cases cited by the Government and appellee, *Van Brocklin*, *Lee v. Osceola*, *Allegheny*, *Kern-Limerick*, *Mayo*, *supra*, are distinguished on the facts and laws from this case and should be limited to their own facts. They are not applicable here.

The real property tax in *Allegheny*, was, as the majority found, on Government property *(in rem)*. The fact that a private person bore the brunt of the tax was considered immaterial. Justices Frankfurter, Douglas and Black, dissenting, were of opinion that, on the precedent of *Draco* (which turned on the fact that the tax therein was not a direct burden on or interference with the Government) the tax should be validated.

The significance of *Draco* and *Graves v. New York*, *Oklahoma Tax Comm. v. Texas Co.*, *S. R. A.*, and *New Brunswick*, *supra* and the like decisions of earlier days, *Thomson* and *Poniston* (Our Br. 81-93) is the determination of the Court to limit the implied immunity of the Government to situations where Governmental functions are directly affected or interfered with and not to extend immunity to private persons. On principle, *Allegheny* cannot be distinguished from these cases, although there may be technical differences in the facts.

(b) Van Brocklin v. Tennessee

In *Van Brocklin* the tax was laid directly upon Government property. The tax was not levied against or even charged to a private person, although when the lien was enforced, a private person had acquired the property.

The case is not in point, as the law there involved was a real property tax law with the property the subject and object of the tax and the Government as owner liable for payment of the tax directly (there being no intervening private person or taxpayer when the tax was levied) and the only means of collection, we assume, being foreclosure of the property taxed.

It is, therefore necessary, under that decision to determine whether a tax is upon a *means* of Government operations and whether it would *interfere* with such operations.

This Court should, therefore, be concerned with whether or not the materials or work in process herein involved are actually "means" of Government operations and whether this tax would interfere with such operations.

If they are not such "means" and there is no interference, as we have shown (Br. 113-119), then the tax should be valid under *Van Brocklin*, as well as *Draco*, *King-Boozer*, etc, *supra*.

The decision in *Van Brocklin* was based on authorities such as *Collector v. Day*, 11 Wall. 113, *Dobbins v. Erie County*, 16 Peters 435, now reversed. (See *Graves v. New York*, 306 U. S. 466, 486, 492).

See discussion above of these now obsolete cases in *Van Brocklin* at pp. 177-178 of 117 U. S.

As Justice Frankfurter said in his concurrence in *Graves v. New York, supra*, at 491, 492 of 306 U. S.:

> "The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exe-

gesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of the constitutionality is the Constitution itself and not what we have said about it. Neither *Dobbins v. Erie County*, 16 Pet. 435, 10 L. Ed. 1022, and its offspring, nor *Collector v. Day (Huffington v. Day)* 11 Wall. 113, 20 L. ed. 122, *supra*, and its (offspring) can stand appeal to the Constitution and its historic purposes. Since both are the starting points of an inter-dependent doctrine, both should be, as I assume them to be, overruled this day. Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live is matter for another day."

Van Brocklin is an "offspring" of *Dobbins* and *Collector v. Day* and it is at least doubtful if it can "stand appeal to the Constitution and its historic purposes" more so than its parents.

Even the principles of *M'Culloch* stated at length by Justice Gray in the *Van Brocklin* opinion, 117 U. S. at 155-156 as authority, hardly admit of the conclusion reached by the Court:

"All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are upon the soundest principles, exempt from taxation. *The sovereignty of a state* extends to everything which exists by its own authority or is introduced by its permission, but *does not extend to those means which are employed by Congress to carry into execution the powers conferred on that body by the People of the United States. The attempt to use the taxing power of the state on the means em-*

> *ployed by the government* of the Union, in pursuance of the Constitution, is itself, an abuse. * * *" (Italics ours.)

It may be, as the Court said, that the property involved in that case, being acquired by the Government for nonpayment of taxes, was a means employed under the constitutional power of Congress to levy and collect taxes, but it ceased to be such means when those taxes were paid by redemption or sale before the levy.

The argument in support of the tax in *Dobbins* was similar in many respects to the argument we here urge that this tax is by law and application a personal levy and charge. The Court rejected this claim, saying at p. 445 of 16 Pet. (U. S.):

> "It will not do to say, as it was said in argument, that though the language of the act may import that offices and posts of profit were taxable, that it was the citizen who holds the office whom the law intended to tax, and that it was a burden he was bound to bear in return for the privileges enjoyed, and the protection received from government; and, then, *that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person.*
>
> The first answer to be given to these suggestions, is that the tax is to be levied upon a valuation of the income of the office." (Italics ours.)

If the personal nature of this tax be rejected, as it was above by the Court in *Dobbins*, then the rule of *Dobbins* will be resurrected in spite of its interment by *Graves v. New York, supra.*

Enforcement of a lien was the subject of the *Van Brocklin* case. There was no question, as here, as to the liability of a private person for payment of a tax assessed

against such private person even though Government property might be used to measure such tax. The tax being directed against Government property and the Government, as owner, being the taxpayer (no private person being responsible for its payment or collectible at the time of assessment and levy) the levy of the tax was held void and therefore there was nothing to support the lien and its foreclosure.

If, as the Court said in *Van Brocklin*, the Government was holding title as security for payment of a tax, then how does it differ in principle or practice from the facts in *S. R. A.* and *New Brunswick* where the Government held title as security for the payment of the balance on a contract of sale? In only one respect,—a private person could be taxed and collected from in *S. R. A.*, but not in *Van Brocklin* at the time the tax was levied.

If law is based on common sense and the law of implied federal immunity is predicated upon possible harm to the Government of a tax upon its property or instrumentalities, then the decisions in *S. R. A.* and *New Brunswick* must be accepted as in accord with the fundamental basis of the doctrine of implied immunity and its limitations. *Van Brocklin*, *Lee v. Osceola*, and *Allegheny* must be open to serious question even as *Collector v. Day* and *Dobbins* were. They can only be justified on the ground of an economic—or remote effect on the Government,—certainly not upon its need of preservation or protection.

(c) Lee v. Osceola Imp. Dist.

Lee v. Osceola Imp. Dist., 286 U. S. 643, was a case involving a reassessment of lands for the benefits of an improvement made while the land was owned by the Government, the lands at the time of the reassessment being privately owned.

Neither the incidence of this assessment nor its direct burden were on the United States or its property. The only possible effect on the Government was economic, i.e. if the possibility of an assessment being later levied would have to be considered on the sale of the property then the Government might have to take less for it than otherwise. Conversely, however, it could be assumed that the Government would receive more for the property because of the improvement and if the price was reduced to compensate for such a possible assessment, then the Government lost nothing.

Either *S. R. A.* and *New Brunswick* are good law and this is bad or vice versa. Certainly, if, as the Court said in *Lee* the assessment was invalid because it constituted an encumbrance on Government property (retroactively — how or in what manner the Court does not explain), then the assessments in *S. R. A.* and *New Brunswick* should have been invalid as encumbrances, the Government still having title to the property when they were levied.

Equally, if the effect of the tax on the Government is merely economic, *Draco, Graves*, etc. have since ruled that out as a cause of invalidity.

We submit that *Lee* must be considered as no longer sound, if it ever was, under the correct principles and interpretation of the immunity doctrine. Under the facts, it is not applicable.

(d) United States v. Mayo

In *Mayo*, State fertilizer inspection fees were "laid directly upon the Government", the Government being the owner of the fertilizer and the State threatened to stop the agents of the Government from distributing the fertilizer until the fee (for inspection) was paid.

The basis of the decision in *Mayo* was interference with the distribution by United States agents of fertilizer belonging to the Government. The State of Florida was attempting to enforce an act, as stated by the Court below:

> "regulating the fertilizer industry and not legislation for raising revenue and the fees required are only one aspect of a total scheme of regulation which cannot be validly applied to the United States, its property or transactions. The property of the United States is immune from seizure even to collect a valid tax and certainly this federal property is immune from State seizure even to collect a valid fee." *United States v. Mayo*, 47 Fed. 552, 557.

The case was an action by the United States to enjoin interference with the distribution of fertilizer by United States agents.

That case is a concrete example of how enforcement of a regulatory law directly against the Government or its agents constitutes an interference with Government operations. How does that decision apply to the facts here where neither the assessment nor its collection interfere with Government operations? This is not a regulatory law, enforcement of which stops a Governmental function.

This Court upheld the decision of the lower Court there, saying that the inspection fees were laid directly upon the

United States and that they were money exactions required before the United States could execute a function of Government.

The Court distinguished *King-Boozer, Graves v. New York* and *Penn. Dairies v. Milk Control Commission*, 318 U. S. 261, saying that the exactions therein directly affected persons who were acting for themselves and not for the United States. Similarly, Murray is here acting for itself and not the United States, its contract with the United States not making it a Government agent or instrumentality, *Dravo*.

(c) S. R. A., Inc. v. Minnesota
New Brunswick v. United States

S. R. A. and *New Brunswick* stand for the principle of preservation of the sovereign's supremacy and *M'Culloch's* doctrine of implied immunity stemming therefrom and at the same time preserve the sovereign state rights of taxation by holding, in effect, that where a private person is responsible for payment of a tax and the tax may be collected by action against him or his interests, leaving the Government's interests in the property unimpaired, such a tax is valid.

So long as the Government instrumentality "holds title to lots *solely for its use and benefit* they are not subject to local taxation." *New Brunswick v. United States, supra*, (Br. 109), citing *Clallam County v. United States*, 263 U. S. 341, 344. *Van Brocklin* might be justified under *Clallam* and *New Brunswick* because at the time the tax was levied the Government was holding title to the property "for its sole use and benefit."

The converse of that, obviously, is that lots (or other property) title to which is held by a Government instru-

mentality not "solely for its use and benefit" are subject to taxation when, as these cases hold, the Government's interest is protected and the impact of the tax and its collection is on a private person. The assessments in *S. R. A.* and *New Brunswick* were upon the entire lots, including not only the interests of the purchasers, as equitable owners, but the interest of the Government instrumentality.

There was no separation of interests of individual and Government in the assessments (as the Court in *Allegheny* said was necessary to validate a property tax, 322 U. S. 187).

The separation of the Government's and the individual's interests in those cases was in the enforcement and in making the tax and levy subject to the Government's prior rights, as we have done here (Br. 107-110).

In *New Brunswick* the Court carefully pointed all this out (Br. 109) and we fail to see any difference in principle or comparable fact and law between the facts and law here before the Court and those in that case. Taxing a purchaser of property as equitable owner and taxing a person in possession because of that possession is; under the laws of taxation and implied Government immunity, no different, if, in both cases, the protection of the Government's interest is adequate.

As this Court has said in *Northern Pac. R. R. v. Myers*, 172 U. S. 589, 598-599, in reference to many earlier land patent cases "Embarrassment to the title of the United States by a sale of the land for taxes seems to have been the concern and basis of those cases." Similarly this was the Court's concern in *S. R. A.* and *New Brunswick*.

And as Judge Cooley, in *Cooley on Taxation*, has said, there is nothing hostile in the assessment for taxes. It

is only the levy or seizure of the property that is hostile to the citizen (or the Government). (Our Br. 98).

And we need look no further than *United States v. Alabama*, 313 U. S. 273 (Our Br. 108) to find complete protection of the Government from any hostile procedure for collection of a tax regardless of whether such tax is levied directly upon Government property or upon a private person. And *S. R. A.* and *New Brunswick* reaffirm that decision with the added protection of the wording of the assessment roll in *S. R. A.* that the assessment is subject to the Government's rights.

The Attorney General of the United States in 1806, in an opinion written to the Secretary of State—before *M'Culloch*—after saying that he thought the Government *ought not admit* of the exercise of the power of local taxation of Government property, said "it would be harmless, however, because it could not be enforced." (See 117 U. S. 163.) Similarly, that is what this Court held in *United States v. Alabama, supra*, holding a tax and lien valid but the lien unenforceable against Government property (313 U. S. 281-282).

The logic of this approach comes from *M'Culloch* as we have heretofore shown.

If this Court is concerned with the effect of a tax on the Government's functions, as it was in *M'Culloch, Dravo, Graves v. New York, S. R. A., New Brunswick, et al., supra*, and not with absolutes, as in *Allegheny*, then the law and facts here present indicate a valid tax.

If the respective orbits of the powers of federal and state government, both as to taxation and government functions, are kept in separate spheres so that there can be no destruction of or interference with one or the other,

then Chief Justice Marshall's original concept is maintained. And if a private person is between the two to intercept any action one against the other, then there can be no interference and should be no immunity.

To assess a tax directly against Government property or functions without a private person being responsible for its payment and collectible therefor would be a futile gesture inasmuch as it could not be collected.

But where a private person is made responsible for its payment and it may be collected from him or his property, the Government is not interfered with, nor can it be, but the local government can collect its tax. If the Federal Government be hurt in pocket because it assumes the tax voluntarily by contract or because the tax is included in the price of the article it purchases, that is *damnum absque injuria* applied to the field of implied immunity *(Draco)*.

CONCLUSION

Wherefore Appellants and Petitioners City of Detroit, a Michigan Municipal Corporation and County of Wayne, a Michigan Constitutional Body Corporate, join in requesting relief at the hands of this Court as appears in their Brief filed with the Court.

Respectfully submitted,

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November 8, 1957.